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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-831

WARDEN, LEWISBURG PENITENTIARY,

Petitioner,

v.

BENIGNO MARRERO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported as *United States ex rel. Marrero v. Warden*, 483 F.2d 656 (3d Cir. 1973). The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 347 F. Supp. 99 (M.D Pa. 1972).

QUESTION PRESENTED

Whether the government can presently deny a federal prisoner parole consideration under 18 U.S.C. §4202,

despite the fact that the sole bar to parole eligibility was expressly repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, simply because the prisoner was convicted of a pre-repeal offense?

COUNTERSTATEMENT

On August 27, 1973, the Court of Appeals rendered its opinion upholding Benigno Marrero's habeas corpus application and directed that he be relieved of the unlawful restraint of parole ineligibility to which the government had asserted he was subject. In so doing, the Court vindicated his claim that parole eligibility under 18 U.S.C. §4202 was a question of a federal prisoner's status under the laws of the United States, not his sentence, that Section 4202 operated according to its terms unless some other existing law acted to render it ineffective, and that there was no such other law.

Mr. Marrero's Claim

Benigno Marrero was, and still is, confined in the United States Penitentiary at Lewisburg, Pennsylvania, serving a mandatory minimum sentence prescribed by the law in effect at the time of his conviction, May 27, 1970. The principal issue presented by his habeas application (App. [1] 6), according to Mr. Marrero, was whether the government's claim that a statute no longer in force, former 26 U.S.C. §7237(d), operated to render Section 4202 inapplicable to him.

Section 7237(d) had been repealed on May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, §1101 (the "1970 Act"), an Act which

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[1] "App. " denotes page " " of the printed Appendix.

marked a fundamental change in the federal government's policy with respect to narcotics offenses.

Congress had specifically concluded that mandatory minimum sentences, without possibility of parole, the essence of prior narcotics legislation, served no useful purpose and, in fact, operated to hinder both law enforcement and effective control of drug abuse; indeed, Congress specifically recognized that an effective program of rehabilitation was essential if drug abuse were to be controlled. *See, e.g.*, 116 CONG. REC. 33616, 33631, 33648, 33649, 33650, 35056 (1970) (debates on the 1970 Act).

As the *Report of the House Interstate and Foreign Commerce Committee to Accompany H.R. 18583*, H.R. Rep. No. 1444, 91st Cong., 2d Sess. (1970), explicitly pointed out:

> [The 1970 Act] is designed to deal in a comprehensive fashion with the growing menance of drug abuse in the United States . . . by providing for an overall balanced scheme of criminal penalties involving drugs. 1970 U.S. CODE, CONG. & AD. NEWS 4567.
>
> With one exception . . . all mandatory minimum sentences are eliminated. *Id.* at 4570

Referring to the report of the Prettyman Commission, the Committee recognized that rehabilitation, not retribution, was the underlying objective of the Act. *Id.* at 4574-75. And the Attorney General of the United States had likewise spoken out against mandatory minimum sentences. *See* 116 CONG. REC. 33627 (1970) (remarks of Reps. Conyers and Eckhardt). In short, both the Legislative and Executive branches had rejected the underlying philosophy of prior narcotics legislation at the time that Section 7237(d) was repealed.

Benigno Marrero's conviction was under an earlier retributive, not rehabilitative, statutory scheme. His

sentence, on the first count, was directed by 21 U.S.C. §174. That section, a rather imprecise provision which addressed itself to many issues beyond sentence, stated:

> For provisions relating to sentencing, probation, etc., see Section 7237(d) of the Internal Revenue Code of 1954.

The second count was governed by Section 7237(a) of Title 26, the general penalty provision for narcotics violations. Because this was a second offense, "the penalty for which" was provided in 7237(a), Section 7237(d) applied.

Section 7237(d) stated, in part, that

> [i]n the case of a violation of a law relating to narcotic drugs section 4202 of title 18, United States Code . . . shall not apply.

Section 4202, the general parole statute, allowed federal prisoners to be released on parole after serving one-third of their terms of confinement.

But for Section 7237(d), Benigno Marrero would unquestionably be eligible for parole after serving one-third of his mandatory minimum sentence.[2] And the 1970 Act, which repealed Section 7237(d), marked a complete rejection by the Executive and Legislative branches of the mandatory minimum, no parole provisions of prior law embodied in Section 7237(d) and elsewhere, and the medieval concepts of punishment on which they were predicated. Certainly the repeal of Section 7237(d) allowed Section 4202 to operate according to its terms, thus making Benigno Marrero eligible for parole.

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[2] The government asserts that the sentencing court intended that Mr. Marrero remain in jail for more than 3-1/3 years. (Petitioner's Brief at 20 n.10.) Unfortunately, Respondent does not possess a crystal ball with which to test this assertion; the record certainly contains no facts to support it.

The Government's Claim

The resolution of this case depends upon an interpretation of two "savings" statutes, Section 1103(a) of the 1970 Act and 1 U.S.C. §109, and of their effect, if any, on Sections 4202 and 7237(d). The issue is more than one of mere semantics, for continuation of Section 7237(d)'s bar to parole eligibility under 18 U.S.C. §4202 would be in express derogation of the principles which Congress has directed are to govern our national policy toward drug abuse.

The government asserts[3] that the two "savings" statutes render the 1970 Act's repeal of Section 7237(d) ineffective. It makes this contention despite the fact that denying parole eligibility to Benigno Marrero would contravene our national policy regarding rehabilitation of drug offenders, the fact that there are only 800 prisoners in Mr. Marrero's position (*see Baratta, et al. v. Sigler, et al.*, No. A-725, Appellees' Application, Annex C), and the fact that parole is an important rehabilitative tool.

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[3]The government's principal argument in the Court of Appeals did not address the question of Section 7237(d). Rather, the government argued that Benigno Marrero had elected the wrong remedy, that his habeas application was premature because he had not filed a motion under 28 U.S.C. §2255 and, thus, that the district court lacked jurisdiction to consider his claim. Although it purports to preserve this jurisdictional issue in its brief to this Court through a footnote reference (Petitioner's Brief at 10 n.4). even though it was not in the petition for certiorari, the government has finally elected to address the substantive issue presented by this case. But it is interesting to note that in *Baratta v. Sigler*, Nos. 73-2111-19 (3d. Cir.), the government denied that any jurisdictional issue was presented by the *Marrero* case and represented to the Third Circuit that "the only issue remaining for decision by the Supreme Court is the merits of Marrero's claim." Reply to Appellees' Response to Appellant's Motion to Continue Filing ¶¶ 2 & 3.

Furthermore, the government even admits that considering Mr. Marrero and other prisoners in his position for parole would not impede the U.S. Parole Board or the Bureau of Prisons in the proper exercise of their functions (Petitioner's Brief at 8).

The government's argument has been rejected, not only by the Third Circuit in this case, but, in other well-reasoned opinions, by the Courts of Appeals for four other circuits. *Alvarado v. McLaughlin*, 486 F.2d 541 (4th Cir. 1973); *Amaya v. U.S. Board of Parole*, 486 F.2d 940 (5th Cir. 1973); *United States v. Marshall*, 485 F.2d 1062 (D.C. Cir. 1973); *United States v. McGarr*, 461 F.2d 1 (7th Cir. 1972); *see Arias v. United States*, 484 F.2d 577, 578-79 (7th Cir. 1973).

Moreover, the Second Circuit, which was the first Court of Appeals to accept the government's position, has reconsidered and retracted its earlier decisions on the issue. *United States v. Huguet*, 481 F.2d 888, 890-92 (2d Cir. 1973). Indeed, only one Court of Appeals can realistically be said to now stand opposed to Mr. Marrero's position—the Tenth Circuit. *Perea v. United States Board of Parole*, 480 F.2d 608 (10th Cir. 1973). As is shown below, the government and *Perea* are wrong and the shared conclusion of the overwhelming majority of the Courts of Appeals which have considered the issue is correct.

SUMMARY OF ARGUMENT

Parole eligibility under Section 4202 is a legislative grant not a judicial one. Parole eligibility flows from Section 4202 itself and applies to all persons specified by the statute. Consequently, the repeal of Section 7237(d), the only bar to parole eligibility under Section 4202, allowed Benigno Marrero to become eligible for parole on

June 20, 1973, the date on which he served one-third of his sentence.

In its attempt to avoid this inevitable result, the government presents a confusing, intertwined series of arguments concerning Sections 1103(a) and 109, the terms "prosecution" and "penalty", and extracted legislative comments. In an attempt to bring order to this chaos, Respondent will separately address the operation and effect of Sections 1103(a) and 109. When correctly viewed, it becomes apparent that neither Section 1103(a) nor Section 109 operates to revitalize the repealed bar to parole eligibility under Section 4202.

Section 1103(a) was intended only to save "prosecutions" under prior law. Parole eligibility under Section 4202 is, in no sense, part of a "prosecution". And the mere fact that a prisoner is sentenced during a "prosecution" and that Section 4202 applies to prisoners serving a "sentence" is of no significance. Parole eligibility under Section 4202 is a creature of statute, not of a determination by a trial court during the course of a "prosecution". Consequently, Section 1103(a) does not operate to render the repeal of Section 7237(d) ineffective.

Section 109, intended to preclude "technical abatements"[4] and designed only to provide general rules for statutory construction, also fails to render Section 7237(d)'s repeal ineffective. Actually, Section 109 should not be applied to the 1970 Act at all since that Act contained its own "savings" provision. And the language of Section 109 itself, which preserves "prosecutions" and prevents the extinguishment of "penalties", does not bar parole under Section 4202.

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[4] In fact, this is the same as preserving "prosecutions".

The term "prosecution", obviously, is no bar in Section 109 since it is not one in Section 1103(a). The term "penalty", which must be read consistent with "prosecution", includes only the imposed sentence and other acts of the sentencing court. Parole eligibility under Section 4202 is not determined by the sentencing court and release on parole is not a release or extinguishment of sentence. Consequently, Section 109 is not a bar.

Finally, if there is doubt about how to apply Sections 109 and 1103(a) to Sections 4202 and 7237(d), the doubt should be resolved in Benigno Marrero's favor, since prisoners should receive the benefit of any ambiguity in a statute's construction. Such a resolution necessitates Mr. Marrero's being considered eligible for parole under Section 4202.

ARGUMENT

I.

THE 1970 ACT'S REPEAL OF 26 U.S.C. §7237(d) WAS NOT RENDERED INEFFECTIVE BY SECTION 1103(a) OF THE 1970 ACT

The key "savings" statute for purpose of this case is Section 1103(a). The critical language in that section is:

> Prosecutions for any violation of law occurring prior to [May 1, 1971] shall not be affected by the repeals . . . [made by the 1970 Act] . . . , or abated by reason thereof.

Only if ineligibility for parole under Section 4202 is part of a "prosecution", as that term is used in Section 1103(a), can that section create a bar against Mr. Marrero. *See also* H.R. Rep. No. 91-1444, 1970 U.S. CODE, CONG. & AD. NEWS 4647.

The fact of the matter is that the term "prosecution" does not preclude parole consideration under Section

4202. Parole under Section 4202 is an act of legislative grace. *See United States v. Frederick*, 405 F.2d 129, 133 (3d Cir. 1968); *O'Neill v. United States*, 315 F. Supp. 1352, 1354 (D. Minn.), *aff'd*, 438 F.2d 1236 (8th Cir. 1970); *Marchand v. Director*, 296 F. Supp. 532, 534 (D. Mass. 1969), *vacated on other grounds*, 421 F.2d 331 (1st Cir. 1970). Unlike accelerated parole or probation, *see* 18 U.S.C. §§4208 & 3651, Section 4202 parole flows from the language of the statute itself; it cannot be affected by the action of a trial judge, *see* 18 U.S.C. §4208, during the course of a "prosecution".

As this Court held in *Bradley v. United States*, 410 U.S. 605, 611 (1973), a "prosecution" terminates when sentence is imposed. *See Korematsu v. United States*, 319 U.S. 432 (1943); *Berman v. United States*, 302 U.S. 211, 212 (1937). And Section 1103(a) applies only to events prior thereto or "so close in time" that the events and the act of sentencing are "essentially a single proceeding." *Bradley v. United States*, 410 U.S. at 609 n.4. Parole under Section 4202 occurs long after sentence has been imposed and the "prosecution" has terminated, *id.* at 611 n.6, and is therefore not a part of "prosecution", *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

Indeed, were this not correct, this Court would necessarily have reached the Section 4202 issue in *Bradley*, for it is well-established law that all matters pertaining to the propriety of "sentence"[5] can be considered on the direct appeal of a criminal conviction; it is equally well-established that such matters can also be raised by motion to correct sentence in the trial court,

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[5]The government admits that if "prosecution" bars parole under Section 4202 then parole is part of "sentence" and is reviewable as such. (Petitioner's Brief at 10 n.4.)

see Fed. R. Crim P. 35. And if parole eligibility under Section 4202 is determined by the sentencing process, a full panoply of Fifth and Sixth Amendment safeguards would necessarily be required at parole hearings, because they too would be part of that process, *see Mempa v. Rhay*, 389 U.S. 128 (1967), not the lesser safeguards approved by this Court in *Morrissey*.

Because parole under Section 4202 is dependent solely upon the operation of the statute itself, the fact that Section 4202 applies to prisoners serving "sentences" imposed during a "prosecution" is irrelevant. *Alvarado v. McLaughlin*, 486 F.2d 541, 543-44 (4th Cir. 1973); *Amaya v. U.S. Board of Parole*, 486 F.2d 940, 942 (5th Cir. 1973); *United States v. Marshall*, 485 F.2d 1062, 1065 (D.C. Cir. 1973); *United States ex rel. Marrero v. Warden*, 483 F.2d 656 (3d Cir. 1973); *United States v. McGarr*, 461 F.2d 1, 4-5 (7th Cir. 1972). No decision made by the sentencing court will be altered by considering Mr. Marrero for release on parole. And, as is shown in Point II, *infra*, even releasing Mr. Marrero on parole would not change his sentence or any decision made during the course of his "prosecution".

In short, the term "prosecution" used in Section 1103(a) does not operate to freeze the statutory scheme by which the rehabilitative parole mechanism of Section 4202 is implemented. Section 7237(d) was expressly repealed and Section 1103(a) does not resurrect it.

II.

SECTION 109 DOES NOT VITIATE THE 1970 ACT'S REPEAL OF SECTION 7237(d)

The only remaining possible bar to considering Mr. Marrero for parole under Section 4202 is 1 U.S.C. §109,

the general federal "savings" statute. Section 109 states:

> *The repeal of any statute shall not have the effect to release or extinguish any penalty*, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, *and such statute shall be treated as still remaining in force for the purpose of sustaining any proper* action or *prosecution* for the enforcement of such penalty, forfeiture, or liability. 1 U.S.C. § 109 (emphasis added).

The language of this statute indicates that only if allowing Mr. Marrero to be considered for parole under Section 4202 would "release or extinguish" a "penalty", or would result in a "prosecution" not being sustained, would it be a bar. And, as is shown below, Section 4202 parole is not part of a "prosecution" and its availability is not a release or extinguishment of a "penalty". Consequently, Section 109 does not revive Section 7237(d).

But the proper inquiry goes beyond this. Section 109 is also not applicable because the 1970 Act contained its own "savings" provision, Section1103(a). Section 109, moreover, was never intended to erect substantial impediments to effectuating remedial statutes; it was designed only as a simple expedient for avoiding common law "technical abatements". For these reasons as well, Section 109 is no bar to Section 4202 parole.

Section 109–An Expedient for Avoiding Technical Abatements

History reveals that Section 109 was only an expedient and was not intended to make fundamental changes in the law. Section 109 is simply the current codification of Section 4 of Chapter 71 of the Act of February 25, 1871, 16 Stat. 432. *See Great Northern Ry. v. United States*, 208 U.S. 452, 465 (1908). And Section 4 originated in

H.R. 1351, 41st Cong., 2d Sess. (1870), a resolution designed to prescribe the form of enacting and resolving clauses in statutes and to provide general rules of construction.

As the debates on H.R. 1351 make clear, the sole purpose of the 1871 act was to make subsequent statutes less cumbersome, not to make significant changes in the law. *See* CONG. GLOBE, 41st Cong., 2d Sess. 2464-67 (1870); CONG. GLOBE, 41st Cong., 3d Sess. 775-78 (1871). Indeed, the principal debate on H.R. 1351 centered on the wording of enacting clauses and the definition of terms such as "lunatic" and "insane". Obviously, Section 4 of the 1871 act, which was not the subject of Congressional debate, was not meant to substantially change the law.

At common law, the repeal of a statute caused a "technical abatement"[6] of proceedings undertaken pursuant to that statute, unless the repealing statute contained a "savings" provision. *E.g., United States v. Tynen,* 78 U.S. (11 Wall.) 88 (1870). But the inclusion of such provisions, along with long definitional sections of terms common to almost all statutes, made legislation cumbersome.

All that Section 4, and thus Section 109, did was obviate the necessity for including a "savings statute" in every repealing statute in order to preclude "technical abatements". *Hamm v. City of Rock Hill,* 379 U.S. 306, 314 (1964); *see Pipefitter's Local Union No. 562 v.*

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[6] The common law principle that

> the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution. *United States v. Reisinger,* 128 U.S. 398, 401 (1888).

United States, 407 U.S. 385, 434-35 (1972). Eligibility for parole under Section 4202 is certainly not a consequence of a "technical abatement". Thus, for that reason alone, Section 109 should not be applied to revive Section 7237(d) as a bar to parole eligibility. *Amaya v. U.S. Board of Parole*, 486 F.2d at 942; *United States ex rel. Marrero v. Warden*, 483 F.2d at 663.[7]

Section 109 is a General Rule of Construction, thus Superseded by Different Provisions in Subsequent Law

Section 109, moreover, simply provides a general rule for statutory construction. A general rule certainly should not be applied in a case in which Congress has provided a specific, different provision.

The 1970 Act contains its own "savings" provision, Section 1103(a), a section specifically intended to preserve "prosecutions" and nothing more. Consequently this express directive should supersede the general "savings" statute, Section 109.

This Court has considered the question of how Section 109 operates when a subsequent law contains its own clause on two occasions, *Hertz v. Woodman*, 218 U.S. 205 (1910), and *Great Northern Ry. v. United States*,

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[7]Indeed, the only cases in which this Court has applied the general "savings" statute were those in which it operated to avoid a technical abatement. *Pipefitter's Local Union No. 562 v. United States*, 407 U.S. 385 (1972); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Great Northern Ry. v. United States*, 208 U.S. 452 (1908); *United States v. Reisinger*, 128 U.S. 398 (1888). Although this Court did discuss Section 109 in *Hertz v. Woodman*, 218 U.S. 204 (1910), a tax case, it was not applied. *Hertz* thus may stand for the proposition that Section 109 can apply to cases other than "technical abatements" if the conduct concerned falls necessarily within the language of the section. But the history of Section 109 casts doubt upon the validity of such an interpretation.

208 U.S. 452 (1908). On both occasions, this Court enunciated the general proposition that a different provision in a subsequent law supersedes the general "savings" statute. *Hertz v. Woodman*, 218 U.S. at 218; *Great Northern Ry. v. United States*, 208 U.S. at 465.

In *Hertz*, however, this Court found it unnecessary to determine whether Section 109's predecessor applied, because the conduct complained of was within the specific savings statute. And, in *Great Northern*, this Court found only that a statute which allowed pending prosecutions to continue was not so different from the general statute as to preclude a prosecution which had not been begun prior to the repeal. Thus, although *Hertz* and *Great Northern* contain general explanations of how the general "savings" statute operates, neither is directly dispositive of this case.

Section 1103(a) by its very terms applies to all "violations of law" occurring prior to the effective date of the 1970 Act. Unlike the statute in *Great Northern*, it expressly applies to both pending "prosecutions" and "prosecutions" not yet begun. This fact, that Section 1103(a) comprehends all time periods in which any "prosecutions" under prior law could occur, is certainly a justification for its superseding Section 109. And, when Section 109 is viewed in its historical perspective, it becomes obvious that there is no need for Section 109 to operate in a conflicting or cumulative fashion.

Section 1103(a) clearly superseded Section 109.[8] Since 1103(a) did not revive Section 7237(d)'s bar to Section 4202 parole, Section 109 certainly cannot be found to have done so.

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[8] In fact, any other interpretation would render Section 1103(a) superfluous, thus implying that Congress acted irrationally.

The Express Provisions of Section 109 Do Not Operate to Reinstate the Repealed Bar to Section 4202 Parole

Even if Section 109 were applicable to Mr. Marrero, it still would not bar parole eligibility under Section 4202. Parole under that section is not within the purview of the language of Section 109, which applies only to "prosecutions" and to releasing or extinguishing "penalties".

Certainly the word "prosecution" as used in Section 109 does not bar Section 4202 parole. "Prosecution" in Section 109 is identical to that in Section 1103(a). Since Section 1103(a) is not a bar to parole, the term "prosecution" in Section 109 also is not.

The only remaining question under Section 109 is whether parole eligibility under Section 4202 is a *release* or *extinguishment* of a "penalty". But, for several reasons, ineligibility for Section 4202 parole is not a "penalty" as that term is used in Section 109.

First, Section 109 is written in terms of "sustaining any . . . prosecution" and of not having "the effect to release or extinguish any penalty". These terms were written in parallel; the first covering "prosecutions" not yet completed or undertaken and the second covering events that had already occurred. Consequently, "penalty" must be read consonant with "prosecution", each operating to save the same things. *See United States v. McGarr*, 461 F.2d at 4. Since "prosecution" does not preclude Section 4202 parole, neither should the term "penalty".

Second, the proper meaning of "penalty" in a criminal proceeding is the imposed "sentence". *Alvarado v. McLaughlin*, 486 F.2d at 544; *Amaya v. U.S. Board of Parole* 486 F.2d at 942-43; *United States ex rel. Marrero v. Warden*, 483 F.2d at 663. It should not be interpreted to mean the manner in which the sentence is executed.

Since parole involves the manner by which "sentence" is executed, not the sentence itself, *Halprin v. United States*, 295 F.2d 458 (9th Cir. 1961), parole under Section 4202 is not precluded by the term "penalty".

In fact, even releasing Mr. Marrero on parole would not alter his sentence, for parole "is a far different thing from reduction of sentence". *O'Neal v. United States*, 332 F.2d 152, 154 (9th Cir. 1964). Parole is not a forgiving, *Ex parte Rupert*, 38 F. Supp. 152, 153 (N.D. Tex. 1941), and a parolee "is not free of his sentence", *United States ex rel. Gutterson v. Thompson*, 47 F. Supp. 150, 151 (E.D.N.Y. 1942), *aff'd*, 135 F.2d 626 (2d Cir. 1943), but continues to be in custody under that sentence, *Padilla v. Lynch*, 398 F.2d 481, 482 (9th Cir. 1968). Thus parole eligibility under Section 4202 cannot even affect the "penalty", *i.e.*, sentence, imposed upon Mr. Marrero;[9]

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[9] The government cites *United States v. Ross*, 464 F.2d 376 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973), for the contrary proposition. (Petitioner's Brief at 12 n.5.) But it fails to reveal that the opinion in *Ross* was withdrawn by the opinion in *Huguet*. Also, after his conviction, Mr. Ross petitioned for a writ of habeas corpus declaring that he was eligible for parole under Section 4202. The writ was granted, *United States ex rel. Ross v. Warden*, No. 73-156-E (E.D. Ill., Oct. 19, 1973), the government elected not to appeal, and Mr. Ross's parole hearing will be held soon.

The government's argument that ineligibility for Section 4202 parole was intended as a "penalty" under Section 109 rests largely on cases decided under Rule 11 of the Federal Rules of Criminal Procedure. (Petitioner's Brief at 12 n.5.) The fact that parole ineligibility may be a "consequence" of which an accused must be advised, pursuant to Fed. R. Crim. P. 11, prior to accepting a plea of guilty, does not mean that it is a "penalty" for purposes of Section 109. Not only does the language of Section 109 differ from that of Rule 11, but the two were designed to accomplish different purposes.

certainly it does not "release or extinguish" that "penalty".

Third, numerous collateral restraints unrelated to a prosecution flow from a conviction.[10] The construction which the government urges be placed on Section 109 would mean that all such restraints would be saved; but,[11] such a construction would be both impractical and unnecessarily harsh.

In conclusion, it is clear that Section 109 is not applicable in the present case, since the 1970 Act contains its own specific savings provision. Indeed, Section 109, which was originally enacted solely to obviate the need for a specific savings clause in order to

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The government's Section 109 "policy" argument, concerning 21 U.S.C. §848 (Petitioner's Brief at 14-15), is illogical. Legislative application of that section to any person not convicted of that specific offense after verdict of a trier of fact would be both an *ex post facto* law and a bill of attainder. There is no indication that Congress intended either, and it is inconceivable that it could have.

[10]For example, pursuant to 18 U.S.C. §922(h)(1), a person convicted of a crime punishable by a term of imprisonment of more than one year may not possess a rifle, pistol, or other firearm, and under subsection (g)(1), he may not ship any firearms. Under 50 U.S.C. App. §456(m) such a person would not be subject to the draft; and, under 24 U.S.C. §51, he is not allowed to be admitted to the Old Soldiers' Home.

[11]Thus, for example, if someone were convicted in June of 1971 of possession of one marijuana cigarette in 1970 (then a felony under former Sections 4744(a) and 7237(a) of the Internal Revenue Code of 1954), and if on January 1, 1974, 18 U.S.C. §922 were amended to state that it applied to felons who had committed crimes of violence, that person nevertheless could not get a job selling shotguns as a clerk in a department store in 1974. Congress would be required to make an explicit statement in the amending statute that the amendment specifically included persons convicted under prior law for him to hold that job.

prevent common law technical abatement, was neither intended to apply to the present case nor would operate so as to revive Section 7237(d)'s repealed bar to Section 4202 parole.

III.

THE RELEVANT STATUTORY PROVISIONS MUST BE CONSTRUED SO AS TO AVOID INJUSTICE

In determining the effect of Section 1103(a) and Section 109 on the repeal of Section 7237(d)'s bar to parole eligibility, a cardinal rule of statutory construction must be obeyed. Any construction which would result in injustice must be avoided. *Knowlton v. Moore*, 178 U.S. 41, 77 (1900); *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 483 (1868); *Grier v. Kennan*, 64 F.2d 605, 607 (8th Cir. 1933).

Furthermore, the various "savings" provisions themselves should always be construed so as "to avoid inflicting punishment at a time when it can no longer serve any legislative purpose, and would be unnecessarily vindictive." *Hamm v. City of Rock Hill*, 379 U.S. at 313. The repeal of the no parole provision of Section 7237(d) thus must be viewed broadly so as to effect its rehabilitative purpose. *See Camunas v. New York & P.R.S.S. Co.*, 260 F. 40, 52 (1st Cir. 1919).

The government's argument, that the various "savings" provisions operate to preserve Section 7237(d) so as to make Benigno Marrero ineligible for parole, runs counter to these settled rules of statutory construction. Under the rationale urged by the government, the stated Congressional purpose of rehabilitation and flexible treatment for narcotics offenders should be ignored where the offense occurred prior to May 1, 1971, thereby creating an arbitrary and unjust distinction between persons con-

victed of offenses which occurred prior to that date and those which occurred afterward.

This assertion was properly rejected by the Court of Appeals:

> We read §7237(d)'s preclusion of parole as a dated legislative judgment as to the manner by which the actual penalty, i.e., the prison sentence, should be effectuated. To read it otherwise would preclude carrying out the apparent congressional judgment, in repealing the parole ban, that the rehabilitative goals of the criminal justice system will be furthered by parole. Moreover, we can find no rational basis that would justify barring parole for persons convicted of crimes committed before the Act's effective date, yet granting it to persons convicted of subsequent crimes. To the extent parole aids prisoner rehabilitation and consequently strengthens the tensile fabric of society, it is important that we avoid technical, purposeless construction which runs counter to the congressional plan to encourage prison rehabilitation. *United States ex rel. Marrero v. Warden*, 483 F.2d at 663; *accord, Amaya v. U.S. Board of Parole*, 486 F.2d at 942-43; *Alvarado v. McLaughlin*, 486 F.2d at 544-45.

It is clear that the only method of construing the relevant statutes so as to avoid injustice and to effect the Congressional purpose of rehabilitation is to hold that neither Section 1103(a) nor Section 109 reinstated the bar to Section 4202 parole that the 1970 Act expressly repealed. That construction, which has already been adopted by five Courts of Appeals, requires an affirmance of the Judgment of the Third Circuit in this case.

CONCLUSION

The 1970 Act crystallizes the Congressional approach towards rehabilitation of narcotic addicts, which surfaced in 1966 with NARA, and had been carried forward in a number of statutes widening the rehabilitation possibilities available to all concerned—to those merely charged with crime, to those convicted and awaiting sentence, and to those already sentenced. The statute marks recognition of the need for integration of law enforcement with treatment and rehabilitation programs reflecting a "strong consensus" that these are not only interrelated but can have enhancing effects on each other. The broad authority of the Parole Board to set conditions to avoid relapse of former narcotic addicts, and set appropriate conditions on the parolee includes authority *e.g.*, to require adherence to such regimen and surveillance as may be appropriate in the light of rehabilitative treatment and programs available in the community and its treatment centers. These considerations of policy powerfully reinforce the conclusion provided by the text of the law and the *Bradley* opinion, that the 1970 law removes, as of the effective date of May 1, 1971, the restraint that prohibited granting of parole under 18 U.S.C. §4202 to persons convicted and sentenced under earlier Federal laws governing narcotic violations. *United States v. Marshall*, 485 F.2d at 1066 (footnotes omitted).

For the foregoing reasons, the Judgment of the United States Court of Appeals for the Third Circuit should, in all respects, be affirmed.

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Dated: March 21, 1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–831. Argued April 29, 1974—Decided June 19, 1974

The Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective May 1, 1971, makes parole under the general parole statute, 18 U. S. C. § 4202, available for almost all narcotics offenders. Respondent, who had been sentenced before May 1, 1971, and was ineligible for parole under 26 U. S. C. § 7237 (d), which was repealed by the 1970 Act, sought habeas corpus in the District Court, claiming parole eligibility when one-third of his sentence had been served. The District Court denied relief on the ground that the prohibition on parole eligibility under 26 U. S. C. § 7237 (d) had been preserved by § 1103 (a) of the 1970 statute (which provides that "[p]rosecutions" for violations before May 1, 1971, shall not be affected by repeals of statutory provisions) and by the general saving clause, 1 U. S. C. § 109 (which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . ."). The Court of Appeals reversed. *Held:*

1. Section 1103 (a) of the 1970 statute bars the Board of Parole from considering respondent for parole under 18 U. S. C. § 4202, since parole eligibility, as a practical matter, is determined at the time of sentencing, and sentencing is a part of the concept of "prosecution," saved by § 1103 (a), *Bradley* v. *United States*, 410 U. S. 605. Pp. 4–6.

2. The Board of Parole is also barred by the general saving clause from considering respondent for parole, since it is clear that Congress intended ineligibility for parole in § 7237 (d) to be treated as part of the offender's "punishment," and therefore the prohibition against the offender's eligibility for parole under 18

Syllabus

U. S. C. § 4202 is a "penalty, forfeiture, or liability" under the saving clause. Pp. 6–10.

483 F. 2d 656, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-831

Warden, Lewisburg Penitentiary, Petitioner, *v.* Benigno Marrero. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 19, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A now repealed statute, 26 U. S. C. § 7237 (d),[1] provided, *inter alia*, that certain narcotics offenders sentenced to mandatory minimum prison terms should be ineligible for parole under the general parole statute, 18 U. S. C. § 4202.[2] Section 7237 (d) was repealed, effective May 1,

[1] 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V) provided:

"Upon conviction—

"(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

"(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply."

[2] 18 U. S. C. § 4202 provides:

"A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such

1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292, which makes parole under § 4202 available for almost all narcotics offenders. The question for decision in this case is whether the parole ineligibility provision of 26 U. S. C. § 7237 (d) survives the repealer, so that a narcotics offender who has served more than one-third of a sentence imposed before May 1, 1971, remains ineligible for parole consideration under 18 U. S. C. § 4202.

Respondent was convicted of narcotics offenses and, as a second offender, was sentenced before May 1, 1971, to concurrent terms of 10 years imprisonment on each of two counts. 450 F. 2d 373, 374–375 (1971).[3] On February 24, 1972, respondent sought habeas corpus in the United States District Court for the Middle District of Pennsylvania claiming that, since 26 U. S. C. § 7237 (d) had been repealed, he should be eligible for consideration for parole under 18 U. S. C. § 4202 when one-third of his sentence had been served. The District Court, in an unreported decision, denied relief on the ground that the prohibition on parole eligibility of 26 U. S. C. § 7237 (d) had been preserved by § 1103 (a) of the 1970 statute [4] and by 1 U. S. C. § 109.[5] The Court

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term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

[3] Respondent was convicted of violating 21 U. S. C. § 173 (1964 ed.) and 26 U. S. C. §§ 4701, 4703, 4704 (a), and 4771 (a) (1964 ed.). His sentences were imposed under 21 U. S. C. § 174 and 26 U. S. C. § 7237 (a). Section 174 explicitly incorporated the provisions of 26 U. S. C. § 7237 (d), which was directly applicable to the sentence imposed under § 7237 (a).

[4] Section 1103 (a) provides:

"Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals or amendments made by [it] . . . or abated by reason thereof."

[5] 1 U. S. C. § 109 provides in relevant part:

of Appeals for the Third Circuit reversed, holding that neither § 1103 (a) of the 1970 statute nor 1 U. S. C. § 109 continued the prohibition on eligibility for parole consideration in 26 U. S. C. § 7237 (d). 483 F. 2d 656 (1973).[6] We granted certiorari to resolve a conflict among the Courts of Appeals.[7] 414 U. S. 996 (1973). We agree with the District Court and reverse the judgment of the Court of Appeals.

Bradley v. *United States*, 410 U. S. 605, 611 (1973), expressly reserved decision of the question now before us. *Bradley* involved the conviction and sentencing after May 1, 1971, of offenders who committed narcotics offenses before that date. We held that sentencing is a part of the concept of "prosecution" and therefore that the provision of § 1103 (a) of the 1970 Act that "[p]rosecutions for any violation of law occurring . . . [before

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"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[6] The mandate was released before the Circuit Justice signed a stay. The stay was treated, however, as staying all proceedings under the mandate. Respondent's motion to dismiss the writ of certiorari as moot is therefore denied.

[7] The Courts of Appeals for the Second and Tenth Circuits have held that narcotics offenders are ineligible for parole. *United States* v. *De Simone*, 486 F. 2d 1196 (CA2 1972) (but see *United States* v. *Huguet*, 481 F. 2d 888 (CA2 1973); *Perea* v. *Board of Parole*, 480 F. 2d 608 (CA10 1973). In addition to the Court of Appeals for the Third Circuit, in this case, the Courts of Appeals for the Fourth, Fifth, Seventh and District of Columbia Circuits have held that narcotics offenders are eligible for parole. See *Alvarado* v. *McLaughlin*, 486 F. 2d 541 (CA4 1973); *Amaya* v. *Board of Parole*, 486 F. 2d 940 (CA5 1973); *United States* v. *McGarr*, 461 F. 2d 1 (CA7 1972); *United States* v. *Marshall*, — U. S. App. D. C. —, 485 F. 2d 1062 (1973).

May 1, 1971] shall not be affected" by the repeal of 26 U. S. C. § 7237 (d), barred the sentencing judge from suspending the sentences of, or granting probation to, the *Bradley* petitioners and also barred him from making them eligible for early parole, before they had served one-third of their sentences, under 18 U. S. C. § 4208 (a).[8] Although stating in a footnote that "[t]he decision to grant parole under [18 U. S. C.] § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated," we concluded that "[w]hether § 1103 (a) or the general saving statute, 1 U. S. C. § 109, limits that decision is a question we cannot consider in this case." 410 U. S., at 611, n. 6.

I

We hold that § 1103 (a) bars the Board of Parole from considering respondent for parole under 18 U. S. C. § 4202. In concluding in *Bradley* that ineligibility for early parole under 18 U. S. C. § 4208 (a) was part of the "prosecution," we reasoned that, since a District Judge's decision to make an offender eligible for early parole is made at the time of entering a judgment of conviction,

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[8] 18 U. S. C. § 4208 (a) provides:

"(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoners shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

the decision was part of the sentence and therefore also part of the "prosecution." 410 U. S., at 611.

Similarly, a pragmatic view of sentencing requires the conclusion that parole eligibility under 18 U. S. C. § 4202 is also determined at the time of sentence. Since, under § 4202, an offender becomes eligible for parole after serving one-third of his sentence, see n. 2, *supra*, parole eligibility is a function of the length of the sentence fixed by the District Judge. Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence, as it is in the case of § 4208 (a), it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined—and deliberately so—by the sentence of the District Judge. Ineligibility for parole under § 4202 is thus determined at the time of sentencing and, under the teaching of *Bradley*, is part of the "prosecution" saved by § 1103 (a).

We therefore reject respondent's argument that our *Bradley* footnote should be read as holding that, because the decision to grant parole under § 4202 is for the Board of Parole, not the trial judge, and is arrived at after the sentence has been entered and the prosecution has come to an end, the parole eligibility decision is not part of the "prosecution" for purposes of § 1103 (a). Apart from the obvious answer that the Court could not reasonably be thought to have decided in a footnote a question "on which" we said in the text, "we express no opinion," 410 U. S., at 611, respondent's reliance upon the footnote both proves too little and too much. It proves too little, be-

cause the fact that the Board of Parole, not the sentencing judge, finally determines whether and when an offender should be released on parole does not undercut our conclusion that the District Judge, at the time of sentencing, determines when the offender will become *eligible* for consideration for parole and the Board's action simply implements that determination.[9] It proves too much, because, if—as the respondent would have it—the proper focus is upon the time at which release on parole is actually granted or denied, the parole decision, whether made under 18 U. S. C. § 4208 (a) or 18 U. S. C. § 4202, is made long after the "prosecution" terminates; for under both provisions, the Board of Parole ultimately decides whether and when the offender is to be released. But, as previously mentioned, we held in *Bradley* that the District Judge's decision to deny early parole under § 4208 (a) was part of the sentence, and therefore part of the "prosecution."

II

We hold further that the general saving clause, 1 U. S. C. § 109, also bars the Board of Parole from considering respondent for parole.[10]

Congress enacted its first general saving provision, 16 Stat. 432 (1871), to abolish the common-law presump-

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[9] The statement in *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972), that "[p]arole arises after the end of the criminal prosecution, including imposition of sentence" was addressed to the decision determining the time of *release* on parole as distinguished from the decision determining *eligibility*.

[10] Respondent argues that, since the 1970 Act contains its own saving clause, § 1103 (a), that specific directive should be read to supersede the general clause § 109. But only if § 1103 (a) can be said by fair implication or expressly to conflict with § 109 would there be reason to hold that § 1103 (a) superseded § 109. See *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 465–466 (1908). We find no conflict.

tion that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not yet reached final disposition in the highest court authorized to review them." *Bradley* v. *United States, supra,* at 607; see *Bell* v. *Maryland,* 378 U. S. 226, 230 (1964). Common-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties. See *Bradley* v. *United States, supra,* at 607–608; *Lindzey* v. *State,* 65 Miss. 542 (1888); *Hartung* v. *People,* 22 N. Y. 95 (1860); Note, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 121–126 (1972). To avoid such abatements—often the product of legislative inadvertence—Congress enacted 1 U. S. C. § 109, the general saving clause, which provides in pertinent part that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute." See n. 5, *supra.* The determinative question is thus whether the prohibition of 26 U. S. C. § 7237 (d) against the offender's eligibility for parole under 18 U. S. C. § 4202 is a "penalty, forfeiture, or liability" saved from release or extinguishment by 1 U. S. C. § 109.[11]

[11] The Court of Appeals, relying on statements in opinions of this Court that § 109 is intended to obviate "mere technical abatements," see *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 314 (1964), held that, since respondent's conviction and sentence would remain intact even if he were released on parole, the purposes of 1 U. S. C. § 109 would not be served by applying it to save the no-parole provision of 26 U. S. C. § 7237 (d). 483 F. 2d, at 663; see *United States* v. *Stephens,* 449 F. 2d 103, 105–106 (1971). This analysis, it seems to us, begs the relevant question. The no-parole provision of 26 U. S. C. § 7237 (d) was directly incorporated into the sentencing provisions of 21 U. S. C. § 174 and 26 U. S. C. § 7237 (a), see n. 3, *supra,* and if the repeal of 26 U. S. C. § 7237 (d) can be viewed as mitigating respondent's punishment under those sections, his conviction and sen-